

# New Developments in Evidence 1998—The Continuing Saga<sup>1</sup>

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## Introduction

As in years past, 1998 was an exciting year for evidence junkies. A review of this year's cases demonstrates the wide diversity of issues covered under the heading "evidence law." This article does not attempt to discuss every evidence case issued in 1998. Rather, it focuses on those cases and areas that are likely to have the biggest impact on the day-to-day practice of criminal law in the military. Specifically, the article reviews uncharged misconduct evidence admitted under Military Rule of Evidence (MRE) 404(b), protections and exceptions to the rape shield rule (MRE 412), evidence admitted under MRE 413 and MRE 414, the psychotherapist-patient privilege, expert testimony and expert evidence issues, and hearsay exemptions and exceptions.

## Bad Acts Evidence is Hard to Keep Out

Military Rule of Evidence 404(b)<sup>2</sup> prohibits the government from offering uncharged misconduct, or "bad acts" evidence, to prove that the accused is a bad person. The government, however, may use such evidence to prove an element of the charged offense, such as intent or identity.<sup>3</sup> The military judge should consider several factors when balancing the probative value of "bad acts" evidence against the danger of unfair prejudice to the accused.<sup>4</sup> While either party can seek to introduce evidence under this rule, MRE 404(b) is most often used by the government to introduce evidence of the accused's misconduct under

a non-character theory of relevance. Two recent cases, one case from the Court of Appeals for the Armed Forces (CAAF), and one from the District of Columbia Court of Appeals, underscore the difficulty that defense counsel may face in trying to keep this evidence from the fact-finder.

## Rules for Courts-Martial Do Not Trump 404(b) Evidence

In *United States v. Ruppel*,<sup>5</sup> the CAAF held that MRE 404(b) evidence is admissible even if it is in direct contradiction to the Rules for Courts-Martial (R.C.M.). In *Ruppel*, the accused was convicted of sodomy and taking indecent liberties with his minor stepdaughter, CH, and indecent acts with his natural daughter, JR.<sup>6</sup> The convening authority ordered a post-trial hearing to investigate a defense claim that the government had withheld relevant and material information. At the post-trial session, the military judge found that the defense complaint was valid. The convening authority ordered a rehearing on findings on all affected offenses against the stepdaughter. The convening authority also ordered a rehearing on the sentence. The convening authority, however, did not disturb the finding of guilty of an indecent act that the accused had committed with his daughter.<sup>7</sup>

At the rehearing, a different panel convicted the accused of the offenses involving his stepdaughter. At the second trial, the military judge allowed the government to introduce under MRE 404(b) evidence of the indecent act the accused committed with

1. See Lieutenant Colonel Steven Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1. In this article, Lieutenant Colonel Henley intimated that there would be no more new developments in evidence law after his departure from The Judge Advocate General's School. This past year, however, reminded us that Lieutenant Colonel Henley's article, like this one, is not the final chapter. Rather, it is one installment in the continuing saga.

2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404(b) (1998) [hereinafter MCM]. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*Id.*

3. *Id.*

4. *Id.* MIL. R. EVID. 403. Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

5. 49 M.J. 247 (1998).

6. *Id.* at 248.

7. *Id.*

his natural daughter. The government's theory of admissibility was that the indecent assault by the accused of his natural daughter, JR, demonstrated his intent to commit similar offenses with his stepdaughter, CH.<sup>8</sup>

The defense objected to the admission of this evidence at the rehearing, because it violated the provisions of R.C.M. 810(a)(3).<sup>9</sup> The defense claimed that R.C.M. 810(a)(3) precluded the government from making any reference to offenses involving JR at the rehearing on the merits.

Although the CAAF recognized this issue as a case of first impression, they previously addressed a similar issue involving the discussion to R.C.M. 910(g)(3).<sup>10</sup> The discussion to this rule says that the military judge should ordinarily refrain from informing the members of the offenses to which the accused has pleaded guilty until after the panel enters findings on the remaining offenses. The court cited its opinion in *United States v. Rivera*,<sup>11</sup> which held that, in a mixed plea case, the government could introduce evidence on the offenses to which the accused pleaded guilty if it qualifies for admission under MRE 404(b) and is not precluded by MRE 403.<sup>12</sup>

According to the court, the situation in *Ruppel* is no different. If R.C.M. 810 was strictly construed, it would render 404(b) evidence inadmissible in combined rehearing cases. The court was unwilling to elevate what they termed as a procedural rule into an evidentiary rule.<sup>13</sup> The court also rejected the defense claim that use of this evidence at the rehearing vio-

lated notions of fundamental fairness. The court held that the proper application of MRE 404(b) and MRE 403 ensured fundamental fairness for the accused.<sup>14</sup>

The court's opinion that MRE 404(b) trumps the plain language of R.C.M. 810(a)(3) is problematic. First, its analogy of 810(a)(3) to *Rivera* and the discussion to R.C.M. 910(g)(3) is not a good comparison. The conflict that the court addressed in *Rivera* was between MRE 404(b) and the discussion to R.C.M. 910(g). The discussion to R.C.M. 910(g)(3) is not part of the rule and arguably does not carry the same weight of authority as the rule itself. In addition, the language in the discussion to R.C.M. 910(g) still gives the military judge some discretion in deciding whether to admit or exclude evidence of the offenses to which the accused pleaded guilty.<sup>15</sup> The same cannot be said of R.C.M. 810(a)(3). Here, the conflict is between MRE 404(b) and the language of R.C.M. 810(a)(3) itself, not the discussion. Also, the language of R.C.M. 810(a)(3) does not give the military judge discretion to admit this evidence. The rule says, "the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only."<sup>16</sup> In light of these differences, it seems that the CAAF is trying to "fit a square peg into a round hole" by analogizing this situation to *Rivera*.

A second troubling aspect of the opinion is the court's statement that they were not willing to elevate a procedural rule into an evidentiary rule. The interest served by R.C.M. 810(a)(3) is to keep prejudicial information that has the potential to undermine the presumption of innocence away from the members.

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8. *Id.* at 249. The military judge did order the trial counsel to refrain from making any mention of the fact that the accused had actually been convicted of the indecent assault against JR. *Id.*

9. MCM, *supra* note 2, R.C.M. 810(a)(3). This rule provides:

When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not such specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After the findings on the merits are announced, the members if any, shall be advised of the offenses on which the rehearing on sentence has been directed.

*Id.*

10. *Id.* R.C.M. 910(g)(3) discussion. The discussion states: "If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has plead guilty until after findings on the remaining offenses have been entered." *Id.*

11. 23 M.J. 89 (C.M.A. 1986).

12. *Ruppel*, 49 M.J. at 250.

13. *Id.* at 251.

14. *Id.*

15. MCM, *supra* note 2, R.C.M. 910(g) discussion. The discussion states:

If the accused pleaded guilty to some specifications but not others, the military judge should consider, and solicit the views of the parties, whether to inform the members of the offenses to which the accused has pleaded guilty. It is ordinarily appropriate to defer informing the members of the specifications to which the accused has plead guilty until after findings on the remaining specifications are entered.

*Id.*

16. *Id.* R.C.M. 810(a)(3).

The CAAF does not explain or justify why this interest is merely procedural. It would seem that such a fundamental interest is more than simply an issue of procedure. The court also fails to explain why MRE 404(b) should enjoy a higher status than a rule intended to protect the presumption of innocence. The court also fails to enumerate any factors or give judges and practitioners any guidance about what rules for courts-martial are procedural and can be trumped by the rules of evidence. Thus, practitioners are left to guess how CAAF will decide the next case where an evidentiary rule is in conflict with a rule for courts-martial.

### Advice

This case is strong precedent for the government to argue that the rules favor the admissibility of 404(b) evidence. Government counsel should use this case to support an argument that the probative value of 404(b) evidence is not substantially outweighed by the risk of unfair prejudice, even when admissibility is in direct conflict with the rules for courts-martial and potentially impacts on the presumption of innocence. For defense counsel, this case illustrates their difficulty in trying to keep out 404(b) evidence, even when the rules for courts-martial support the exclusion of this evidence. Finally, the opinion serves as notice that, in deciding conflicts between the military rules of evidence and rules for courts-martial, the rules of evidence may preempt the rules of courts-martial.

### Defense Stipulations Do Not Trump 404(b) Evidence

Another method defense counsel may try to use to keep 404(b) evidence out of the court room is to stipulate to the elements that the 404(b) evidence is intended to prove. A recent opinion from the United States Court of Appeals for the District of Columbia, however, significantly limits the defense's ability to force the government into such stipulations. In *United States v. Crowder (Crowder II)*,<sup>17</sup> the United States Court of Appeals for the District of Columbia held that a defendant's offer to con-

cede intent does not prohibit the government from using "bad acts" evidence to prove intent. *Crowder II* is a reconsideration and reversal of the court's earlier opinion in *Crowder I*.<sup>18</sup> In *Crowder I*, the court ruled that the defense could prohibit the government from introducing "bad acts" evidence under Federal Rule of Evidence (FRE) 404(b)<sup>19</sup> by conceding intent.

*Crowder I* and *Crowder II* involved two cases (*Crowder* and *Davis*) that were combined on appeal. In *Crowder*, three police officers saw Rochelle Crowder engage in an apparent drug transaction, exchanging a small object for cash. The police stopped and gestured for Crowder to approach. Crowder turned and ran and the police followed. During the chase, Crowder discarded a brown paper bag. The brown bag contained ninety-three zip-lock bags of crack cocaine and thirty-eight wax-paper packets of heroin. While searching Crowder, the officers also found a beeper and \$988 in small denominations. Crowder denied ever possessing the bag containing drugs. His first trial ended in a mistrial.<sup>20</sup>

At his second trial, the government gave notice of intent to prove Crowder's knowledge, intent, and modus operandi with evidence that Crowder sold crack cocaine to an undercover officer in the same area seven months after his initial arrest. To keep this evidence from the jury, Crowder offered to stipulate that the amount of drugs seized was consistent with distribution so that anyone who possessed them had the intent to distribute. The judge refused to force the government to stipulate and admitted evidence of the later sale over the defense objection.<sup>21</sup>

In the companion case, *Davis*, an undercover police officer purchased a rock of crack cocaine from Horace Davis on a Washington D.C. street corner. After the transaction, the undercover officer broadcast Davis' description over the radio. The police apprehended Davis near the scene a few minutes later as he opened his car door. During a subsequent search of the car, the police found twenty grams of crack cocaine.<sup>22</sup>

At trial, Davis put on a defense of misidentification. He claimed that he walked out of a nearby store just before his

17. *United States v. Crowder*, 141 F.3d 1202 (D.C. Cir. 1998) [hereinafter *Crowder II*].

18. *United States v. Crowder*, 87 F.3d 1405 (D.C. Cir. 1996) (en banc) [hereinafter *Crowder I*].

19. FED. R. EVID. 404(b). Federal Rule of Evidence 404(b) is identical to the military rule and provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

*Id.*

20. *Crowder II*, 141 F.3d at 1204.

21. *Id.* at 1203.

22. *Id.*

arrest. The government sought to introduce evidence that Davis made three prior cocaine sales in this same area to prove his knowledge of drug dealing and his intent to distribute. To exclude this evidence, Davis offered to stipulate that the person who sold the drugs to the undercover officer had the knowledge and intent to distribute. The district court ruled that the government did not have to accept Davis' concession and could prove knowledge and intent through his prior acts.<sup>23</sup>

In *Crowder I*, the D.C. Circuit Court of Appeals held that a defendant's unequivocal offers to concede intent, coupled with an instruction to the jury that the government no longer had to prove that element, made the evidence of other bad acts irrelevant.<sup>24</sup> The court reasoned that the defense concessions, combined with the jury instruction, gave the government everything it required and eliminated the risk that a jury would consider the uncharged misconduct for an improper purpose.<sup>25</sup>

The Supreme Court granted certiorari.<sup>26</sup> The Court vacated the judgment in *Crowder I* and remanded the case for further consideration in light of the Court's opinion in *Old Chief v. United States*.<sup>27</sup> In *Old Chief*, though the Court held that the government should have acquiesced to the defense's offer to stipulate, the Court said that this case was an exception. Justice Souter, writing for the majority affirmed the general rule saying, "when a court balances the probative value against the unfair prejudicial effect of evidentiary alternatives, the court must be cognizant of and consider the government's need for evidentiary richness and narrative integrity in presenting a case."<sup>28</sup> The Court also said, "the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense."<sup>29</sup>

On remand, the D.C. Circuit Court of Appeals reversed its earlier decision, and held that the district court did not err by admitting evidence of uncharged misconduct under FRE 404(b), notwithstanding the defense's willingness to concede intent.<sup>30</sup> The majority noted that *Crowder I* was based on the premise that a defendant's offer to concede a disputed element renders the government's evidence irrelevant. In *Crowder II*, the court reasoned that this premise failed in light of the Supreme Court's holding in *Old Chief*. Evidentiary relevance under FRE 401<sup>31</sup> is not affected by the availability of alternative forms of proof, such as a defendant's concession or offer to stipulate.<sup>32</sup>

According to the court, the analysis of "bad acts" evidence does not change simply because the defense offers to concede the element at issue. The first step in the analysis remains a determination of whether the "bad acts" evidence is relevant under FRE 401. If the government's evidence makes the disputed element (such as intent) more likely than it would otherwise be, the evidence is relevant despite the defendant's offer to stipulate. The next question is whether the government is attempting to properly use the evidence under FRE 404(b). The court reiterated that FRE 404(b) is quite permissive. Finally, even if the evidence is both relevant and admissible under FRE 404(b), the trial judge can still exclude the evidence if it is unfairly prejudicial, cumulative, or misleading.<sup>33</sup>

One factor that the trial judge should consider when making a balancing determination is whether the defendant is willing to concede the element that the evidence is being offered to prove.<sup>34</sup> Counsel will need to focus their efforts on whether a

23. *Id.* at 1205.

24. *Crowder I*, 87 F.3d at 1410-11.

25. *Id.* at 1414.

26. *United States v. Crowder*, 518 U.S. 1087 (1997).

27. 519 U.S. 172 (1997). In 1993, the police arrested Johnny Lynn Old Chief after a fight involving at least one gunshot. Old Chief was charged with, inter alia, violating 18 U.S.C. § 922 (felon in possession of a firearm) and aggravated assault. Old Chief had been previously convicted of assault causing serious bodily injury. To keep this prior conviction from the jury, Old Chief offered to stipulate that he was previously convicted of a crime punishable by imprisonment exceeding one year. *Id.* at 175. The government refused to join in a stipulation. The district court ruled that the government did not have to stipulate and the Ninth Circuit affirmed. *Id.* at 175-76. The Supreme Court granted certiorari and reversed. *Id.* at 194. The Court ruled that it was an abuse of discretion under FRE 403 for the district court to reject the defendant's offer to concede a prior conviction in this case. The district court erred in admitting the full judgment over defense objection when the nature of the prior offense raises the risk that the jury will consider the prior judgment for an improper purpose. It was significant that the only legitimate purpose of the evidence was to prove the prior conviction element of the offense. *Id.* at 174-94.

28. *Id.* at 186-87.

29. *Id.*

30. *United States v. Crowder*, 141 F.3d 1202, 1209 (D.C. Cir. 1998) [hereinafter *Crowder II*].

31. FED. R. EVID. 401. Like the military rule, FRE 401 states: "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.*

32. *Crowder II*, 141 F.3d at 1209.

33. *Id.* at 1210.

defense offer to concede an element renders the “bad acts” evidence unduly prejudicial.<sup>35</sup>

In *Old Chief*, the Supreme Court recognized that the trial judge must be cognizant of the government’s need for “evidentiary richness.” The Court also accepted the proposition that the government is entitled to prove its case free of a defendant’s offer to stipulate. This does not help defense counsel who are seeking to limit the government’s use of 404(b) evidence through stipulations.

The D.C. Circuit’s reconsideration and reversal of its earlier opinion in *Crowder II* further complicates defense counsel’s task. In the future, defense counsel will find it difficult to argue that their willingness to stipulate to a disputed element renders the government’s “bad acts” evidence irrelevant. In light of these cases, the better approach for defense counsel is to argue that an accused’s willingness to concede the element makes the “bad acts” evidence unfairly prejudicial.

On the other hand, government counsel should use the decisions in *Old Chief* and *Crowder II* to their advantage. Citing the Supreme Court’s language, government counsel should argue that the defense cannot dictate the manner in which the government may try its case. Trial counsel must articulate why a stipulation would deny them the ability to preserve the evidentiary richness and narrative integrity of the 404(b) evidence. Finally, government counsel should argue that the defense’s willingness to concede the disputed element is only one factor that the mil-

itary judge should consider in a MRE 403 balancing. The government must show how other factors tip the scale in favor of admissibility.

Adopting a similar analysis, the CAAF recently held that an accused’s decision not to contest an element of the offense does not relieve the government from the burden to prove that element. Accordingly, the government can prove that element with MRE 404(b) evidence. In *United States v. Sweeney*,<sup>36</sup> the accused was charged under North Carolina law<sup>37</sup> with stalking his estranged wife by attempting to gain entrance into her room, posting derogatory comments about her in public places, and willfully damaging her car. At trial, the government introduced evidence that showed that the accused’s relationship with his wife deteriorated about two years after their marriage. After his wife filed for divorce, she asked him to stop contacting her. Despite this request, he continued to call, write, and harass her on a daily basis.<sup>38</sup> In order to prove the accused’s intent to cause emotional distress, the government introduced evidence under MRE 404(b) that the accused stalked his former wife in a similar manner.<sup>39</sup>

The defense argued that the evidence was inadmissible because they were not contesting the accused’s intent to stalk.<sup>40</sup> The CAAF rejected this argument, citing the Supreme Court’s holding in *Estelle v. McGuire*.<sup>41</sup> In *McGuire*, the Supreme Court held that “nothing in the Due Process Clause of the Fourteenth Amendment requires the [s]tate to refrain from introducing relevant evidence simply because the defense chooses not

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34. *Id.*

35. Although no military court has addressed this issue directly, the Court of Military Appeals has hinted at the issue. See *United States v. Orsburn*, 31 M.J. 182 (C.M.A. 1990). Staff Sergeant Steven Orsburn was charged with indecent acts with his eight-year-old daughter. The government offered evidence of three pornographic books found in Orsburn’s bedroom to show his intent to gratify his lust or sexual desires. *Id.* at 188. The defense argued that the evidence was irrelevant because if someone did commit indecent acts with the eight-year-old girl, there was no question that he did so with the intent to gratify his lust or sexual desires. The military judge admitted the evidence over the defense objection. Then-Chief Judge Sullivan, writing for the majority, held that the military judge did not abuse his discretion in balancing the probative value of this evidence against the danger of unfair prejudice. *Id.* Judge Sullivan noted that Orsburn “refused to commit himself on the issue of intent or provide any assurances that he would not dispute intent.” *Id.* In light of *Old Chief* and *Crowder II*, a defense offer to concede intent should not act as a per se bar of “bad acts” evidence in military practice.

36. 48 M.J. 117 (1998).

37. N.C. GEN. STAT. § 14-277.3 (1992). This statute states:

(a) Offense—A person commits the offense of stalking if the person willfully on more than one occasion follows or is in the presence of another person without legal purpose:

- (1) With intent to cause emotional distress by placing that person in reasonable fear of death or bodily injury;
- (2) After reasonable warning or request to desist by or on behalf of the other person; and
- (3) The acts constitute a pattern of conduct over a period of time evidencing continuity of purpose.

*Id.*

38. *Sweeney*, 48 M.J. at 119.

39. *Id.* at 119. The accused’s former wife testified that at the time of their divorce the accused continued to contact her in spite of her requests. He entered her house without her consent; he jumped on her car and banged on the windows; he damaged her car by placing stones in her oil system; and he parked his car in her neighborhood in a surreptitious manner. *Id.*

40. *Id.* at 120. The defense’s theory was that the misconduct never occurred and that the victim was never afraid for her life. *Id.*

to contest the point.”<sup>42</sup> The CAAF held that Sweeney’s argument was similarly without merit because the government was required to prove his intent to cause emotional distress in spite of the defense’s theory of the case.<sup>43</sup>

The defense also contended that the government did not meet its burden of proving this uncharged misconduct by a preponderance of the evidence. According to the defense, the evidence of the uncharged misconduct was circumstantial and there was no direct or conclusive evidence that the accused harassed his former wife. The CAAF rejected this argument as well. The court said that the standard of proof required for the admission of 404(b) evidence is less than the standard required for a finding of guilty. The proper standard for admitting 404(b) evidence is whether the evidence reasonably supports a finding by the court members that the accused committed the misconduct. In this case, the evidence met that standard because the accused’s former wife testified about these prior incidents and provided uncontraverted direct and circumstantial evidence of the prior incidents.<sup>44</sup>

#### *Advice*

The court’s holding in *Sweeney*, read in conjunction with *McGuire*, *Old Chief*, and *Crowder II*, shows that the defense will likely fail in attempting to keep 404(b) evidence out on claims that the defense is not contesting these elements. The government’s need to prove the elements of the offense, preserve evidentiary richness, and maintain narrative integrity will

likely trump any defense claim that the bad act evidence is inadmissible.

*Sweeney* also reminds practitioners of the low standard of proof required to admit 404(b) evidence. As long as the military judge determines that the evidence reasonably supports a finding by the court members that the accused committed the uncharged misconduct and it is not unfairly prejudicial, the evidence should be admitted. Defense claims that the evidence is not conclusive proof that the accused committed the uncharged misconduct go to the weight the panel members may give that evidence, not its admissibility.<sup>45</sup>

### **The Rape Shield Rule v. The Constitution**

The CAAF decided three significant cases this year dealing with the rape shield rule, MRE 412.<sup>46</sup> Practitioners can glean three important points from these cases. First, the defense must lay an adequate foundation to show that evidence of the victim’s past sexual behavior is constitutionally required. Second, the defense has the burden of showing that the evidence is constitutionally required. Finally, evidence of the victim’s sexual orientation is not per se admissible as an exception to the rape shield rule.

In sexual misconduct cases, MRE 412 excludes evidence that the victim engaged in other sexual behavior and evidence of the victim’s sexual predisposition. The rule is intended to shield victims of sexual assaults from embarrassing or degrad-

41. 502 U.S. 62 (1991). Mark McGuire was found guilty in a California state court of the second degree murder of his infant daughter, Tori. McGuire sought habeas corpus relief from his conviction, claiming, among other things, that the trial judge erroneously admitted evidence that the child had suffered a number of injuries prior to the injuries which caused her death. *Id.* at 67-68. The prosecution introduced this evidence to show that the child’s death was not accidental. The defendant argued that since he did not claim that the death was accidental, this evidence was irrelevant and should not have been admitted. *Id.* The Supreme Court disagreed. Chief Justice Rehnquist, writing for the majority, noted that intent was an element of the offense that the government had to prove and evidence of prior injury is relevant to show intent. The Court held that nothing in the Due Process Clause of the Fourteenth Amendment requires the state to refrain from introducing relevant evidence simply because the defense chooses not to contest the point. *Id.* at 69-70.

42. *Id.*

43. *Sweeney*, 48 M.J. at 121-22.

44. *Id.* at 120.

45. MCM, *supra* note 2, MIL. R. EVID. 104(a). This rule establishes the military judge’s role in determining the admissibility of evidence. The rule states: “Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, *the admissibility of evidence*, an application for a continuance, or the availability of a witness shall be determined by the military judge.” *Id.* (emphasis added).

46. *Id.* MIL. R. EVID. 412. This rule provides in part:

(a) The following evidence is not admissible in any proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.  
(2) Evidence offered to prove any alleged victim’s sexual predisposition.

(b) Exceptions.

In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

....

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

*Id.*

ing cross-examination questions.<sup>47</sup> Prior to this rule, exploring the victim's past sexual activity was common in sexual assault cases. The drafters of the rule recognized that this evidence was not only extremely embarrassing to the alleged victim, but the probative value of this evidence was also low, and it often discouraged legitimate victims from reporting crimes.<sup>48</sup> The rape shield rule does, however, allow the defense to admit evidence of the victim's sexual behavior or predisposition if the defense can show that it is constitutionally required. As the following cases indicate, this is not a broad exception.

In *United States v. Carter*,<sup>49</sup> the accused was charged with rape. At trial, the victim's roommate testified that she entered the victim's room and found the accused and the victim in bed. The victim was partially dressed and unconscious. The victim claimed that the accused raped her while she was asleep. The defense wanted to cross-examine the victim about an alleged homosexual relationship she had with her roommate. The defense contended that such a relationship would give the victim and her roommate a motive to lie about the alleged rape. After an Article 39(a)<sup>50</sup> session, the judge ruled that MRE 412 prevented the defense from cross-examining the victim about this relationship.<sup>51</sup>

At the Article 39(a) session, the military judge allowed the defense to show why a cross-examination of the victim on this issue was constitutionally required. The defense proffered that an unnamed female sergeant saw the victim and her roommate at an all-female club dancing and hugging and kissing each other. The victim testified at the hearing that no one could have seen her at a club hugging and kissing her roommate. The military judge allowed the defense to call the unnamed witness to testify at the hearing in order to establish a foundation for the cross-examination. The defense, however, did not call the witness, and the military judge ruled that the defense had not met their burden to show why the cross-examination was constitutionally required under MRE 412 (b)(1)(C).<sup>52</sup>

The CAAF affirmed the military judge's ruling. The court said that the question of whether evidence of the victim's past

sexual behavior is constitutionally required is reviewed on a case-by-case basis. In each case, the defense must establish a foundation demonstrating constitutionally required relevance. In this case, the CAAF held that the defense failed to lay an adequate foundation for the military judge to determine if the evidence was constitutionally required.<sup>53</sup>

The holding in *Carter* reminds defense counsel that they must lay an adequate factual foundation for the victim's sexual behavior before they can argue that its admissibility is constitutionally required. Although the adequacy of the foundation is fact-specific, if the victim testifies at the Article 39(a) hearing and denies the allegations, the defense cannot rely solely on the counsel's proffer to establish the foundation. At a minimum, the defense must call a witness to counter the victim's denials.

In the second rape shield case, *United States v. Velez*,<sup>54</sup> the CAAF held that before the accused could introduce evidence of the victim's sexual behavior, the evidence must be relevant to the defense's theory of the case. The defense cannot use this evidence to launch a smear campaign against the victim. At his rape and assault trial, the accused sought to cross-examine one of the alleged victims about her past sexual behavior. Specifically, the defense wanted to question the alleged victim about three incidents. The first regarded statements that she had made to others about waking up naked in another Marine's room after drinking and playing pool. The second involved the victim's alleged sexually aggressive behavior in a bar. The third incident involved a report of rape that the victim had previously made against another Marine.<sup>55</sup>

The defense argued that this evidence was constitutionally required as an exception to MRE 412. The defense asserted that this cross-examination was necessary to impeach the credibility of the victim's complaint. The military judge did not allow the defense to cross-examine the victim about any of this past sexual behavior.<sup>56</sup>

The CAAF upheld the military judge's decision to exclude this evidence. The court said that MRE 412 places reasonable

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47. See *id.* app. 22.

48. *Id.*

49. 47 M.J. 395 (West 1998).

50. UCMJ art. 39(a) (West 1999).

51. *Carter*, 47 M.J. at 396.

52. *Id.* at 396-97.

53. *Id.*

54. 48 M.J. 220 (1998).

55. *Id.* at 226.

56. *Id.*

limits on the accused's right to cross-examine a witness.<sup>57</sup> The court then analyzed each of the incidents about which the defense wanted to cross-examine the witness.

The defense contended that the earlier pool playing incident was factually similar to her claim of rape in this case and it was necessary to question the victim about the earlier incident in order to assess her credibility. In the earlier incident, the victim had allegedly been drinking heavily and playing pool with a Marine who was not her husband. She later said she woke up naked in the Marine's barracks room. In her complaint in this case, the victim stated that she had been drinking and wanted to play pool with the accused, a Marine who was not her husband.<sup>58</sup>

The court said the differences in the previous incident were greater than the similarities. Most notably, in the prior incident, the victim never made a claim of rape. Thus, the relevance of this evidence on the issue of the victim's credibility was not obvious.<sup>59</sup> The court also noted that the similarity of the two incidents was not significant. Drinking, playing pool, being with a Marine who was not the victim's husband, and some sexual activity were not so unique that they suggested that the victim had made up the rape allegation.<sup>60</sup>

The CAAF also affirmed the military judge's decision to preclude the defense from questioning the victim about her sexual aggressiveness towards another man at a bar. The defense argued that this evidence was admissible under MRE 404(b) to show the victim's lack of credibility. In the case at issue, the victim claimed that she was unable to resist the accused because she was intoxicated, and yet in the previous incident she had acted in a sexually aggressive manner in spite of her intoxication.<sup>61</sup>

The CAAF correctly rejected this argument. The defense has the burden of showing how the victim's sexual aggressiveness to one man undermined her credibility with respect to her charge of rape by the accused. The court saw the defense's argument as a thinly veiled attempt to suggest that a woman sexually aggressive with one man on one occasion cannot be truthful in claiming rape by another man on a different occasion. The CAAF held that this is exactly the type of evidence and argument that MRE 412 is intended to exclude.<sup>62</sup>

The court also rejected the defense's attempt to introduce evidence that the victim had previously made a rape complaint against another Marine. The court rejected this evidence because it failed to meet the basic requirements of logical and legal relevance. According to the court, there was no evidence that the prior rape complaint was false, and the mere filing of a complaint has no bearing on the truthfulness or untruthfulness of the complainant. Accordingly, the evidence had no relevance on this unrelated case.<sup>63</sup>

Finally, the court noted that all of this evidence was inconsistent with the defense's theory of the case. At trial, the accused denied that any sexual incident ever happened. Under this theory, the victim's past sexual history with other men had no relevance. According to the court, the defense was attempting to launch a "smear campaign" that would paint the victim in a bad light.<sup>64</sup>

### *Advice*

This case is a further reminder that the court is unwilling to let the exception in MRE 412(b)(1)(C) swallow the rule. Just because there may be evidence of the victim's past sexual conduct, the evidence is not necessarily admissible. The defense has the burden to show that this evidence is relevant, consistent with their theory of the case, and constitutionally required. The CAAF clearly separated out each of the defense claims in this case and critically analyzed them.

While the court does not specifically say when evidence of the victim's sexual behavior is constitutionally required, the opinion lists several factors that practitioners should consider. First, is the victim's sexual misconduct consistent with the defense theory of the case? If, as in *Velez*, the accused claims he was not involved in any sexual contact, the victim's past sexual behavior or propensity has no relevance. Second, is the victim's past sexual behavior factually similar to the allegations against the accused? In *Valez*, if the victim had alleged that the Marine she had previously played pool with and spent the night with had raped her, this evidence may have some relevance to the accused's case. Third, is the victim's past sexual behavior with one man relevant on the issue of consent with the accused?

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 227.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 228.



In this case, the defense was unable to show how the victim's sexual aggressiveness with one Marine on one occasion had any relevance to sexual contact with the accused on a different occasion. Finally, is the victim's past sexual behavior relevant to her character for truthfulness? In *Velez*, if the defense could have shown that the victim's prior rape allegation was false, it would have had some bearing on her character for truthfulness and may have been admitted under MRE 608(b).<sup>65</sup> What is clear from this case is that CAAF is wary of the defense using sexual behavior evidence to launch a smear campaign against the victim.

In the third rape shield case, the CAAF held that the victim's homosexual orientation is not automatically relevant on the question of whether the victim consented to sexual contact with someone of the same sex. In *United States v. Grant*,<sup>66</sup> the accused was convicted of forcible sodomy and indecent assault. The victim, Senior Airman (SrA) B claimed that after a night of heavy drinking, he was sleeping in the accused's bunk and that while he was asleep, the accused fondled his genitals and performed oral sodomy on him. The accused admitted to fondling SrA B's genitals, but claimed that this was consensual. The accused denied performing oral sodomy on SrA B.<sup>67</sup>

At trial, the defense did not cross-examine SrA B about his sexual orientation, although they sought to elicit testimony from another witness that SrA B was a homosexual. The defense contended that SrA B's sexual orientation was relevant on the issue of consent in this case. The government objected and the military judge ruled that evidence of SrA B's sexual orientation was inadmissible under MRE 412.<sup>68</sup>

On appeal, the defense argued that this evidence was constitutionally required under MRE 412(b)(1)(C) on the issue of consent and also to show SrA B's motive to lie to avoid being exposed as a homosexual. The CAAF rejected the defense's argument that sexual orientation was relevant to the victim's

consent. Military Rule of Evidence 412 is a rule of relevancy. The premise of the rule is that reputation or opinion about the victim's past sexual behavior is not a relevant indicator of consent. The court held that evidence of the victim's sexual orientation, without a showing that the conduct is so particularly unusual and distinctive as to verify the accused's version of the events, is not relevant.<sup>69</sup> The court believes that a victim's homosexual orientation is not so unusual or distinctive that it would verify an accused's claim that the homosexual contact was consensual.<sup>70</sup>

The court did not decide whether this evidence was admissible to show the victim's motive to lie. The court held that the defense waived this argument because they did not proffer the evidence on this basis at trial.<sup>71</sup>

### Advice

This case is a reminder that MRE 412 requires a higher showing of relevance than is required by MRE 401.<sup>72</sup> Under the low standard of MRE 401, the victim's homosexual orientation has some tendency to show that he is more likely to have consented to the accused's contact than if he were a heterosexual. Under the higher relevance standard of MRE 412, however, the court did not believe that homosexual conduct is so particularly unusual and distinctive that it would have verified the defendant's version of events. This case also reminds counsel to articulate all theories of admissibility at trial. Had the defense argued at trial that this evidence was relevant to show SrA B's motive to lie in order cover up his own homosexuality, the military judge may have admitted the evidence or the CAAF may have reversed the judge's decision to exclude the evidence on this basis.

65. MCM, *supra* note 2, MIL. R. EVID. 608(b). This rule states:

Specific instances of conduct of a witness, for the purpose of attacking or supporting the credibility of the witness, other than conviction of a crime as provided in MRE 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning character of the witness for truthfulness or untruthfulness . . . .

*Id.*

66. 49 M.J. 295 (1998).

67. *Id.* at 296.

68. *Id.* at 297.

69. See *United States v. Sanchez*, 44 M.J. 174, 179-80 (1996).

70. *Grant*, 49 M.J. at 297.

71. *Id.*

72. MCM, *supra* note 2, MIL. R. EVID. 401. This rule defines relevant evidence as: "[E]vidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.*

## Once a Molester, Always a Molester

Two fairly new rules that federal and military courts have begun to struggle with are MRE 413 and 414.<sup>73</sup> These rules represent a significant departure from the longstanding prohibition against using uncharged misconduct to show that the accused is a bad person or has the propensity to commit criminal misconduct.<sup>74</sup> Both rules state that evidence that an accused committed either acts of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant. Absent from these rules are the familiar limitations found in MRE 404(a) and (b) that specifically prohibit the government from using uncharged misconduct to prove that the accused has a bad character or that he has the propensity to commit the charged offenses. Free from these limitations, trial counsel can now argue that, because the accused has committed similar misconduct in the past, he is more likely to have committed the charged offenses. Courts must now decide whether there are any limits to the use of uncharged misconduct under these rules and whether the use of this evidence to show the accused's bad character violates the Due Process Clause or the Equal Protection Clause of the Constitution.<sup>75</sup> Three cases illustrate how the courts are trying to resolve these issues.

The first case involved a constitutional challenge to FRE 414.<sup>76</sup> In *United States v. Castillo*,<sup>77</sup> the defendant was charged with several acts of child sexual abuse against his daughters. At trial, the children testified not only to the charged abuse, but also to other uncharged acts of abuse. The doctors who treated the victims also testified that one of the victims told him that the defendant had molested her at least ten other times. This evidence was admitted under FRE 414. At trial, and on appeal, the

defendant challenged FRE 414 as a violation of his Due Process and Equal Protection rights.

The Tenth Circuit Court of Appeals began its review by noting that this rule is a significant departure from FRE 404(b). The court said that in child abuse cases, FRE 414 replaces the restrictive FRE 404(b) and allows the government to prove the defendant's bad character and argue his propensity to molest children.<sup>78</sup>

Citing the language of the Supreme Court in *Michelson v. United States*,<sup>79</sup> the court noted that a ban on the use of propensity evidence may have a constitutional dimension. In spite of *Michelson*, the court said that there is no case that directly holds that the use of propensity evidence violates the Due Process Clause. For a rule of evidence to violate the Due Process Clause, the rule must violate fundamental conceptions of justice.<sup>80</sup> The court said FRE 414 did not violate these fundamental concepts of fairness for three reasons.

First, the court cited historical practice. In the court's view, while there is a long history in the United States of courts excluding propensity evidence, the record regarding evidence of one's sexual character is more ambiguous.<sup>81</sup> According to the court, several states have relaxed the rules against the use of propensity evidence in cases involving illicit sex. Some states even developed a "lustful disposition" rule allowing past sexual misconduct to be admitted to show a defendant's bad character. The court said this historical ambiguity favors the use of this evidence because the protection afforded the defendant is not deeply rooted.<sup>82</sup>

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73. *Id.* MIL. R. EVID. 413, 414. Military Rule of Evidence 413 states in part: "In a court-martial in which the accused is charged with an offense of sexual assault, evidence of the accused's commission of one or more offenses of sexual assault is admissible and may be considered for its bearing on any matter to which it is relevant." *Id.* MIL. R. EVID. 413. Military Rule of Evidence 414 states: "In a court-martial in which the accused is charged with an offense of sexual child molestation, evidence of the accused's commission of one or more offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant." *Id.* MIL. R. EVID. 414.

74. See *Michelson v. United States*, 335 U.S. 469 (1948) (discussing the prohibition against using uncharged misconduct to prove the accused's bad character). In *Michelson* the Court said propensity evidence is inadmissible because it weighs too much with the jury and may overpersuade them. The jury may convict an accused because of a bad general record without focusing on the offense that the accused stands charged with. *Id.* at 469-70. This common law principle is reflected in both the federal and military rules of evidence. Military Rules of Evidence 404(a) and (b) state that evidence of a person's character is not admissible for the purpose of proving that the person acted in conformity with that character on a particular occasion. MCM, *supra* note 2, MIL. R. EVID. 404(a), (b).

75. U.S. CONST. amend. V, XIV.

76. Federal Rules of Evidence 413 and 414 mirror the military rules in all pertinent parts. Federal Rule of Evidence 414 states: "In a criminal case in which the defendant is accused of an offense of sexual child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant." FED. R. EVID. 414(a).

77. 140 F.3d 874 (10th Cir. 1998).

78. *Id.* at 879.

79. 335 U.S. 469 (1948).

80. *Castillo*, 140 F.3d. at 881.

81. *Id.*

82. *Id.*

Second, the court noted that other rules of evidence have been found to be constitutional even though there is a risk that a defendant will be convicted because of his bad character. The most notable rule in this category is FRE 404(b). In spite of this risk, the Supreme Court has upheld the constitutionality of that rule.<sup>83</sup>

Third, and most importantly, FRE 403 still applies to the admissibility of this evidence. According to the court, this is the most significant factor favoring the constitutionality of FRE 414. The court held that the FRE 403 balancing test applied to evidence admitted under FRE 414 in spite of the rule's language that says that evidence of other similar misconduct "is admissible."<sup>84</sup> Under this balancing test, the trial judge must ensure that the evidence is both relevant and not unfairly prejudicial. Accordingly, the judge should always exclude evidence that would violate the defendant's fundamental right to a fair trial. The court remanded the case to the trial court for a fuller explanation of how the judge conducted the FRE 403 balancing in this case.

The defendant also challenged the rule as a violation of the Equal Protection Clause. He argued that the rule treats this class of suspects differently than other suspected criminals and affords them fewer protections. The court acknowledged that the rule does treat this class of criminal suspects differently than others, but in conclusory language, the court held that this was not a violation of the Equal Protection Clause.<sup>85</sup> The court reasoned that under the rational basis test, Congress intended the rule to enhance effective prosecutions in child molestation cases. According to the court, these cases are often difficult to prove and these rules provide important corroboration evidence that would otherwise be lacking. This was a sufficient basis for the disparate treatment of this class of suspects.<sup>86</sup>

#### Comment

*Castillo* is an important case for military practitioners. This is one of the first federal cases to address the constitutionality of either the federal or the military rule. The opinion provides

a template that other courts, including the Air Force Court of Criminal appeals, have followed in analyzing these new rules of evidence. The court's view that FRE 414 specifically allows the government to use evidence of other misconduct to argue that the accused has a bad character or criminal propensity is significant. In spite of the rule's language, not all courts have been as willing to accept this proposition.<sup>87</sup>

In its decision, the court avoided a strict reading of the rule. The rule itself says that prior misconduct of a similar nature "is admissible." The rule does not indicate that other rules of evidence provide any limitation on the admissibility of this evidence. Nevertheless, *Castillo* reads a FRE 403 balancing requirement into the rule. Absent this balancing requirement, it is unlikely that the court would have found the rule to be constitutional. The question remains whether FRE 403 sufficiently protects the accused's Due Process rights because the rule itself favors the admissibility of relevant evidence unless the probative value is substantially outweighed by the risk of unfair prejudice. The court does not give any guidance to trial judges on what factors they should consider in balancing these interests.

Following closely on the heels of *Castillo* and adopting a very similar analysis, the Air Force Court of Criminal Appeals upheld the constitutionality of MRE 413 in *United States v. Wright*.<sup>88</sup> In *Wright*, the accused was charged with rape, house-breaking, and two specifications of indecent assault with two different victims. The accused pleaded guilty to one specification of indecent assault and unlawful entry, but pleaded not guilty of indecent assault and rape of the second victim. At trial, the military judge allowed the government to introduce evidence under MRE 413 of the indecent assault to which the accused pleaded guilty. The judge specifically allowed the government to use this evidence to argue that the accused had the propensity to commit the indecent assault and rape of the second victim. The military judge also instructed the members concerning the use of this evidence to show propensity.<sup>89</sup>

On appeal, the defense argued that MRE 413 is unconstitutional on its face because it violates the Constitution's Due Process and Equal Protection Clauses. Addressing the Due

83. *Id.* at 882

84. *Id.*

85. *Id.* at 883.

86. *Id.*

87. See *e.g.*, *United States v. Hughes*, 48 M.J. 700 (A.F. Ct. Crim. App. 1998). This case involved the admission of evidence under MRE 414 against the accused. The Air Force Court did not address the constitutionality of the rule, but evaluated how the rule was applied in that particular case. In a concurring opinion, Senior Judge Snyder explained that MRE 414 still does not allow the government to argue that the accused has the propensity to molest children. Judge Snyder said that MRE 414 just expands the arguments that the government could already make under MRE 404(b). According to Judge Snyder, MRE 414 expressed Congress's preference for this testimony to be admitted even if there is some risk that the members may use it as propensity evidence. *Id.* at 730-31 (Snyder, J., concurring). It is difficult to see how Judge Snyder's view is supported by either the language or legislative history of the rule, neither of which put any limits on how this evidence is to be used. Further, the legislative history specifically assumes that evidence admitted under this rule will be used to show the accused's propensity. See, *e.g.*, 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Representative Molinari); *Id.* S12990 (daily ed. Sept. 20, 1994) (statement of Senator Dole).

88. 48 M.J. 896 (A.F. Ct. Crim. App. 1998).

Process challenge, the court assumed, as did the Tenth Circuit with FRE 414, that MRE 413 allows the government to use similar uncharged misconduct evidence to prove the accused's propensity to commit sexual assault crimes.

The Air Force Court said that in order for MRE 413 to violate the Due Process Clause, the rule must violate fundamental notions of fairness. Adopting much of the analysis of the *Castillo* court, the Air Force Court held that historically there is "no fundamental conception of justice which precludes admission of prior bad acts of the same type as those of which the accused stands charged."<sup>90</sup> The court concluded that the protections against the use of propensity evidence in sexual assault cases are not so fundamental to our system of justice that they equate to a due process right.<sup>91</sup>

Absent from the court's opinion is any direct mention of MRE 403 and how it should serve to protect the accused against the admission of unfairly prejudicial evidence. In a footnote, the court said, without elaboration, that the military judge in this case properly conducted a MRE 403 balancing. In that same footnote, the court also sent a clear message to military judges that MRE 403 should not pose much of a hurdle to the admissibility of MRE 413 and MRE 414 evidence. The court said, "during such balancing, judges should recognize that the presumption is in favor of admission."<sup>92</sup>

The defense also challenged the rule on equal protection grounds, alleging that it prevents a group of suspects from receiving a fair trial. According to the defense, because MRE 413 denies these suspects a fair trial, the court should apply a strict scrutiny standard of review. The court rejected this argument as well. The court applied a rational basis standard of review because sexual offenders were not members of a suspect class and MRE 413 does not otherwise violate fundamental notions of fairness. Under this standard, the court held that Congress had a rational basis for this rule to provide a means by which evidence of patterns of abuse and similar crimes could be admitted into evidence.<sup>93</sup> Therefore, MRE 413 does not violate the Equal Protection Clause.

This is the first military case to address the constitutionality of either MRE 413 or MRE 414 directly. The Air Force Court

turned to the Tenth Circuit and adopted much of its rationale for upholding the constitutionality of this rule. Indeed, *Wright* reads like a condensed version of *Castillo*. In this condensed version, however, the Air Force Court omits some critical aspects of *Castillo*.

In *Castillo*, the court stressed the need for the trial judge to conduct a FRE 403 balancing test before admitting this evidence. The court even remanded the case to the trial court so the judge could develop the FRE 403 balancing on the record. The Air Force Court, however, did not mention the role MRE 403 plays in ensuring that the accused's due process rights are protected. This failure is unfortunate because it may send an unintended message that military judges do not need to do a detailed balancing, or that they do not need to articulate how they did the balancing test. The court in *Wright* should have done more than simply adopt the Tenth Circuit's analysis. They should have specifically addressed how MRE 403 applies to this evidence and what they expect of the military judge in conducting a balancing test.

On the equal protection issue, the Air Force Court again was too willing to adopt the Tenth Circuit's opinion without any independent analysis. The court said that the strict scrutiny standard did not apply to MRE 413 because no court has identified sex offenders as a suspect class.<sup>94</sup> The court's reasoning places the cart before the horse, because the court assumes that these suspects are sexual offenders when that is the very issue at trial. Further, MRE 413 does not limit admissibility of uncharged misconduct only to prior convictions or determinations that the accused is a sexual offender. The rule says "evidence of the accused's commission of one or more offenses of sexual assault is admissible."<sup>95</sup> The court failed to adequately address why suspects of sexual assault and child molestation should get less procedural protections than other classes of suspects.

The third case to tackle these new rules is *United States v. Henley*.<sup>96</sup> Here, the accused was charged with molesting his son and daughter over a five-year period. The government introduced other instances of molestation that allegedly occurred outside the five-year statute of limitations. The government offered this evidence under MRE 404(b) and MRE 414. The

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89. *Id.* at 899.

90. *Id.* at 901.

91. *Id.*

92. *Id.* at 899 n.1.

93. *Id.* at 901.

94. *Id.*

95. MCM, *supra* note 2, MIL R. EVID. 413(a).

96. 48 M.J. 864 (A.F. Ct. Crim. App. 1998).

military judge admitted this evidence over the defense's objection.

On appeal, the defense argued that the military judge erred in admitting this evidence under MRE 414. Appellate defense counsel did not challenge the admissibility of this evidence under MRE 404(b). The Air Force Court held that the evidence was admissible under 404(b) and that any issue of the evidence's admissibility under MRE 414 was, therefore, moot. The court reasoned that because MRE 404(b) is a more restrictive rule, evidence admitted under that rule is per se admissible under MRE 414.<sup>97</sup>

The court's reasoning is incorrect. Even if the evidence is admissible under MRE 404(b), that does not automatically render it admissible under MRE 414. This is because evidence admitted under MRE 404(b) can only be admitted for a non-character purpose. Further, the military judge will give a limiting instruction to the panel that specifically tells them that they cannot consider this evidence to conclude that the accused has a bad character or has a propensity to commit criminal misconduct. These limitations are in contrast with the theory behind the admissibility of evidence under MRE 414. Under MRE 414, the evidence is expressly admitted for its tendency to show the accused's propensity to commit this type of offense. Because the theories of admissibility under MRE 404(b) and MRE 414 differ, evidence admitted under MRE 404(b) does not moot questions of admissibility under MRE 414. Judge Snyder, who wrote the opinion, believes that evidence admitted under MRE 414 cannot be used as propensity evidence.<sup>98</sup> Judge Snyder's opinion illustrates that judges who are uncomfortable with the broad language of MRE 413 and MRE 414 may look to more familiar rules of evidence to analyze the admissibility of uncharged misconduct in sexual assault and child molestation cases.

## Advice

These three cases provide military practitioners some important insights about the use of these new rules. First, in spite of the broad language of the rules, courts may narrow their application. No court is likely to take the term "is admissible" at face value. On the contrary, courts like *Castillo* will apply other rules to control the admissibility and use of this evidence. The most significant control is MRE 403. This rule gives the military judge the discretion to preclude evidence that is unfairly prejudicial, even if otherwise admissible.

Practitioners should also analyze the admissibility of evidence under MRE 413 and MRE 414 under the same rubric they use for MRE 404(b) evidence. Counsel should ask whether: (1) the evidence is relevant, (2) the evidence is sufficient and in an admissible form, and (3) the risk of unfair prejudice substantially outweighs the probative value.<sup>99</sup>

Finally, in spite of the rule's language and its legislative history, some courts may agree with Judge Snyder and be unwilling to admit this evidence for its tendency to show the accused's bad character or his propensity to commit sexual assaults or child molestation. Accordingly, government counsel must be prepared to argue other non-character theories of relevance for the admissibility of this evidence under MRE 404(b).

## Your Secret is Safe With Me . . . NOT!

In 1997, the Army Court of Criminal Appeals stated in *United States v. Demmings* that a psychotherapist-patient privilege may exist in the military.<sup>100</sup> The Army Court's opinion was dicta, and raised the question of whether such a privilege really exists. In 1998, a different panel of the Army Court addressed the issue directly and held that there is no psychotherapist-patient privilege.

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97. *Id.* at 870.

98. *United States v. Hughes*, 48 M.J. 700, 730 (A.F. Ct. Crim. App. 1998) (Snyder, J., concurring). See *supra* note 86 and accompanying text.

99. See, e.g., *United States v. Miller*, 46 M.J. 63, 65 (1996).

100. See *United States v. Demmings*, 46 M.J. 877 (Army Ct. Crim. App. 1997) (citing *Jaffe v. Redmond*, 518 U.S. 1 (1996)). In *Jaffe*, the Court held that there is a psychotherapist-patient privilege under federal common law that extends to licensed social workers. *Jaffe*, 518 U.S. at 16.

*United States v. Rodriguez*<sup>101</sup> involved an accused convicted of intentionally injuring himself by shooting himself in the abdomen. At trial, the accused claimed that the self-inflicted wound was an accident. During his medical treatment prior to trial, however, the accused told a psychiatrist that he wanted to cause some injury to himself so he could get sent home.<sup>102</sup> At trial and on appeal, the defense tried to suppress these statements claiming privilege.<sup>103</sup>

The Army Court rejected the defense's claim for two reasons. First, the court held that the federal common law privilege without specifically tailored parameters and exceptions necessary in a military environment is not practical.<sup>104</sup> The court said an unrestricted general privilege could endanger safety and security, and commanders could be deprived of critical information, thereby, putting their soldiers and missions in jeopardy.<sup>105</sup> The court cited the language of MRE 501(a)(4)<sup>106</sup> to support its holding. Military Rule of Evidence 501(a)(4) says that the military recognizes the common law privileges to the extent that these privileges are practical and not inconsistent with the code, these rules, or the *Manual for Courts-Martial*. The court believed that a broad psychotherapist-patient privilege is not practical in a military context.

The court also said that MRE 501(d) already bars the application of the *Jaffe* privilege for psychiatrists employed by the armed forces. Military Rule of Evidence 501(d) says that information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian in a professional capacity.<sup>107</sup> The court held that this language covers not only doctors but psychiatrists as well.<sup>108</sup>

Because a psychotherapist-patient privilege is both impractical, and inconsistent with the language of MRE 501(d), the court said it does not exist and will not exist until the President expressly creates one.<sup>109</sup> A draft proposal recognizes a limited psychotherapist-patient privilege in the military.<sup>110</sup> The proposed MRE 513 would offer a limited privilege to persons subject to the UCMJ and psychotherapists. This rule will not likely be adopted before late 1999. For now, Army practitioners should assume that there is no privilege. Defense counsel must take this into consideration in advising clients to seek counseling.

## Expert Evidence

Last year was a banner year in the area of expert testimony and scientific evidence. Two of the most important cases came from the Supreme Court. In one, the Court addressed the standard of review that appellate courts should apply when reviewing a trial judge's decision to admit or exclude scientific evidence. In the second, the Court held that the judge's gatekeeping function applies to all types of expert evidence. Finally, the Supreme Court ruled on the constitutionality of MRE 707. The CAAF also addressed a number of expert evidence issues. For the first time, the court looked at the admissibility of expert testimony in the area of eyewitness identification. The CAAF also revisited a recurring issue regarding the scope of an expert's opinion.

101. 49 M.J. 528 (Army Ct. Crim. App. 1998).

102. *Id.* at 529.

103. *Id.*

104. *Id.* at 531-32.

105. *Id.*

106. MCM, *supra* note 2, MIL. R. EVID. 501(a)(4). This rule states:

(a) A person may not claim a privilege with respect to any matter except as required or provided for in:

....

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to rule 501 of the Federal Rules of Evidence insofar as application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the code, these rules, or this Manual.

*Id.*

107. *Id.* MIL R. EVID. 501(d).

108. *Rodriguez*, 49 M.J. at 533.

109. *Id.* at 532.

110. Appendix A to this article contains the text of proposed MRE 513.

## Standard of Review

After the Supreme Court's opinion in *Daubert v. Merrell Dow Pharmaceuticals Inc.*,<sup>111</sup> the federal circuits were confused about the standard of review that appellate courts should apply when reviewing a trial judge's decision to admit or exclude scientific evidence. In *General Electric Company, et al. v. Joiner*,<sup>112</sup> the Supreme Court resolved this dispute. In this case, the plaintiff claimed that his exposure to polychlorinated biphenyls (PCBs) manufactured by General Electric caused his lung cancer. To support this claim, the plaintiff intended to call two experts to testify about studies showing that exposure to PCBs caused cancer in laboratory animals. The trial judge ruled that the plaintiff's expert testimony did not show a sufficient link between PCBs and lung cancer. The court excluded the testimony and granted summary judgment for the defendant.<sup>113</sup>

The Eleventh Circuit Court of Appeals reversed the district court's ruling. The appellate court applied a "particularly stringent standard of review" when it reviewed the judge's decision to exclude the expert testimony. The court reasoned that this stricter standard was necessary because the federal rules of evidence governing scientific evidence display a preference for admissibility.<sup>114</sup>

The Supreme Court granted certiorari and reversed the Eleventh Circuit. The Court rejected the Eleventh Circuit's "particularly stringent standard." A unanimous Court held that abuse of discretion is the proper standard for reviewing a trial judge's decision, and nothing in *Daubert* or the federal rules created a stricter standard with scientific or other expert testimony.<sup>115</sup>

## Advice

This case reminds practitioners and judges that there is nothing so unique about the admissibility of expert testimony that

requires the appellate courts to apply a special standard to the trial judge's decision. As with most evidentiary rulings, the standard of review for the judge's decision is abuse of discretion. This holding, coupled with the Court's ruling in *Daubert*, gives the trial judge significant power over the admissibility of scientific testimony. The military judge must serve as the gatekeeper to ensure that only reliable scientific testimony reaches the fact finder. In that gatekeeper role, the judge has wide discretion and should not be second-guessed by the appellate courts simply because they disagree with the trial judge's decision.

## Supreme Court Clarifies Daubert

In the second decision,<sup>116</sup> the Supreme Court clarified another nagging issue that remained unanswered after their landmark opinion in *Daubert*.<sup>117</sup> In clear, understandable language, the Court held that the trial judge's gatekeeping responsibility in evaluating the reliability of expert testimony applies not only to testimony based on scientific knowledge, but also to testimony based on technical and other specialized knowledge.<sup>118</sup> The Court also clarified that the trial judge can use the factors announced in *Daubert* as well as other appropriate factors to evaluate the reliability of scientific and non-scientific expert testimony.<sup>119</sup> Finally, the Court's opinion reiterated the considerable leeway and broad latitude that the trial judge must have in making reliability determinations regarding expert evidence.<sup>120</sup>

In an age of increasing reliance on expert evidence in courts-martial, *Kumho Tire* has important implications for criminal practitioners and military judges. When read in connection with *Daubert*, and *General Electric v. Joiner*,<sup>121</sup> *Kumho Tire* completes a trilogy of cases on expert testimony and sets the course for the admissibility of expert evidence for decades to come. There are several points practitioners must take away

111. 509 U.S. 579 (1993). In *Daubert*, the Supreme Court overruled the *Frye* test, which federal courts had used to evaluate the reliability of novel scientific theories. The Court set out factors that trial judges should use to evaluate the reliability of evidence developed through the scientific method. The Court also stressed the role of the trial judge as the gate keeper, charged with keeping the courtroom free of "junk science."

112. 118 S. Ct. 512 (1997).

113. *Id.* at 516.

114. *Id.*

115. *Id.* at 517.

116. *Kumho Tire v. Charmichael*, 119 S. Ct. 1167 (1999).

117. 509 U.S. 579 (1993).

118. *Kumho Tire*, 119 S. Ct. at 1171.

119. *Id.*

120. *Id.*

121. 522 U.S. 136 (1997).

from this trilogy. First, the trial judge's gatekeeping responsibility applies to all types of expert testimony. Second, the trial judge can use the factors announced in *Daubert* as well as other appropriate factors to evaluate the reliability of expert evidence. Third, the role of the trial advocate in demonstrating the reliability of expert testimony is more important than ever before. Finally, military judges will enjoy broad discretion in deciding on the reliability and admissibility of expert testimony.

### Polygraphs

In *United States v. Scheffer*,<sup>122</sup> the Supreme Court reversed the CAAF, holding that MRE 707,<sup>123</sup> which excludes polygraph evidence from courts-martial, does not unconstitutionally abridge an accused's right to present a defense.<sup>124</sup>

The accused was charged with, among other offenses, wrongful use of methamphetamine. At trial, the accused offered an innocent ingestion defense and moved to introduce the results of an exculpatory polygraph test administered by the Air Force Office of Special Investigation in order to corroborate his in-court testimony. Citing MRE 707, the military judge refused to allow the accused to introduce or attempt to lay a

foundation for the introduction of the polygraph examination results.<sup>125</sup>

On appeal, the CAAF reversed the military judge, holding that MRE 707 violated the accused's Sixth Amendment<sup>126</sup> right to present a defense.<sup>127</sup> The CAAF adopted the Supreme Court's rationale in *Rock v. Arkansas*,<sup>128</sup> where the Court stated that a legitimate interest in barring unreliable evidence does not extend to an exclusion that may be reliable in an individual case.<sup>129</sup> The CAAF concluded that the trial court should rule on the admissibility of polygraph evidence on a case-by-case basis and remanded the case to the trial court for an evidentiary hearing on the admissibility of the polygraph results.<sup>130</sup> The government appealed and the Supreme Court granted certiorari.<sup>131</sup>

On 31 March 1998, the Supreme Court reversed, holding that MRE 707's exclusion of polygraph evidence does not unconstitutionally abridge the right of accused members of the military to present a defense.<sup>132</sup> Writing for an eight-person majority, Justice Thomas held that rules restricting the accused from presenting relevant evidence do not violate the Sixth Amendment so long as they are not arbitrary or disproportionate to the purposes they are designed to serve.<sup>133</sup>

The Court then examined the reliability of polygraph evidence. The Court found that there was no scientific consensus

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122. 118 S. Ct. 1261 (1998).

123. MCM, *supra* note 2, MIL. R. EVID. 707. This rule provides:

(a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

(b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

*Id.*

The President promulgated Military Rule of Evidence 707 pursuant to Article 36(a), UCMJ. The stated reasons for the ban were: (1) there is no scientific consensus on the reliability of polygraph evidence, (2) the belief that panel members will rely on the results of polygraph evidence rather than fulfill their responsibility to evaluate witness credibility and make an independent determination of guilt or innocence, and (3) the concern that polygraph evidence will divert the focus of the members away from the guilt or innocence of the accused.

124. *Scheffer*, 118 S. Ct. at 1261.

125. *Id.*

126. U.S. CONST. amend. VI.

127. *United States v. Scheffer*, 44 M.J. 442, 445 (1996). The court assumed but did not address whether the President acted in accordance Article 36(a) UCMJ in promulgating Military Rule of Evidence 707. *Id.*

128. 483 U.S. 44 (1987) (striking down Arkansas' ban on post hypnotic testimony).

129. *Id.* at 61.

130. *Scheffer*, 44 M.J. at 449.

131. *United States v. Scheffer*, 117 S. Ct. 1817 (1997).

132. *United States v. Scheffer*, 118 S. Ct. 1261, 1263 (1998).

133. *Id.* at 1264.



that polygraph evidence is reliable. The Court noted that most state courts and some federal courts still impose a ban on polygraph evidence and that courts continue to express doubt about whether such evidence is reliable even in jurisdictions that do not have a ban.<sup>134</sup> Given the widespread uncertainty about the reliability of polygraph evidence, the Court held that the President did not act arbitrarily or disproportionately in promulgating MRE 707.<sup>135</sup>

In a concurring opinion, Justice Kennedy, joined by three other justices, stated that the only valid interest served by MRE 707 is to prevent unreliable evidence from being introduced at trial. Because of the ongoing debate about the reliability of polygraph evidence, he was unwilling to require all state, federal, and military courts to consider this evidence.<sup>136</sup> Justice Kennedy then said that while MRE 707 is not unconstitutional, he doubts that a rule of exclusion is wise, and that some later case may present a more compelling case for the introduction of polygraph evidence.<sup>137</sup> He did not indicate what a more compelling case may be.

The only dissenter, Justice Stevens, said the President's promulgation of MRE 707 may violate Article 36(a) of the Uniform Code of Military Justice (UCMJ)<sup>138</sup> because there is no identifiable military concern that justifies a special evidentiary rule for courts-martial.<sup>139</sup> Justice Stevens also believed that polygraph evidence is as reliable as other scientific and non-scientific evidence that is regularly admitted at trial.<sup>140</sup> Given this reliability and the very sophisticated polygraph program administered by the Department of Defense, Justice Stevens said it is unconstitutional to deny an accused the use of this evidence.<sup>141</sup>

### Analysis

*Scheffer* guarantees that polygraph evidence will continue to be excluded from the trial phase of courts-martial. Despite this ruling, the case raises a number of questions. Eight justices held that, because there is no scientific consensus about the reli-

ability of polygraph evidence, the President's ban is not unconstitutional. The majority opinion, however, does not give any guidance as to the level of scientific consensus required before MRE 707's ban would no longer be justified. Furthermore, neither Justice Thomas' opinion nor Justice Kennedy's concurrence discusses how a ban on polygraph evidence is compatible with *Daubert*, which gives wide discretion to the trial judge to admit or exclude scientific evidence.

Finally, the majority opinion did not address the issue raised by Justice Stevens in his dissent that the President's promulgation of MRE 707 may violate Article 36(a), UCMJ. The majority opinion did not discuss or note any unique military concerns that justify a special evidentiary rule for courts-martial.

In spite of the 8-1 decision upholding the constitutionality of MRE 707, the Court's support of this unwise ban is lukewarm. Given a more compelling case, four justices may join Justice Stevens and require trial courts to consider the introduction of this evidence.

### Polygraph Evidence in Preliminary Hearings

Military Rule of Evidence 104 states that the rules of evidence, except for those with respect to privileges, do not apply at preliminary hearings and other proceedings under Article 39(a), UCMJ.<sup>142</sup> Is polygraph evidence then admissible at these pre-trial hearings because the rules do not apply? The CAAF noted, but avoided, this issue in *United States v. Light*,<sup>143</sup> a post-*Scheffer* case. In *Light*, the accused was convicted of larceny for stealing government equipment. During the investigation he failed a CID polygraph. The polygraph failure was one factor that a Texas justice of the peace used to justify granting a search warrant of the accused's civilian quarters. On appeal, the CAAF considered whether the polygraph results can be considered in deciding probable cause. The CAAF noted the apparent tension between MRE 104 and MRE 707, but decided the case on other grounds. The court did say that this is an area that the President may want to clarify in the future.<sup>144</sup> Nothing

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134. *Id.* at 1266.

135. *Id.*

136. *Id.* at 1269 (Kennedy, J., concurring).

137. *Id.*

138. UCMJ art. 36(a) (West 1999).

139. *Scheffer*, 118 S. Ct. at 1272 (Stevens, J., dissenting).

140. *Id.* at 1276 (Stevens, J., dissenting).

141. *Id.* at 1270 (Stevens, J., dissenting).

142. MCM, *supra* note 2, MIL. R. EVID. 104.

143. 48 M.J. 187 (1998).

in MRE 707 or any other evidentiary rule prohibits the convening authority from considering the accused's passing or failing of a polygraph examination in deciding the appropriate disposition of the case.

### Limits on the Expert's Opinion

One recurring issue that the appellate courts seem to face every year is the scope of an expert's opinion. The question most often arises in child molestation and sexual assault cases. Often the government seeks to introduce expert testimony about common reactions that victims of these crimes suffer. The expert then opines that the victim in the case at trial suffered similar reactions. The problem is that often the expert's opinion can cross the line and become a comment on the victim or another witness's credibility. Military and federal courts have consistently held that such testimony is not helpful to the fact finders because the witness has no expertise on questions of witness credibility.

The case that best illustrates the point this year is *United States v. Birdsall*.<sup>145</sup> In *Birdsall*, the accused was convicted of indecent acts, indecent liberties, and sodomy of his two sons. Two psychologists interviewed both boys several times before trial. Both boys claimed that the accused fondled them and performed anal sodomy on them on several occasions. No physical evidence corroborated the molestation, and the accused denied ever touching the boys inappropriately.<sup>146</sup>

At trial, the two doctors who interviewed the boys testified as experts in pediatrics and child abuse. Both experts testified about statements the victims made to them. Over a defense objection, the first doctor also testified that in his opinion the children were victims of sexual abuse. The second doctor testified that in her opinion the cases were founded and the children were the victims of abuse and incest. She further testified that the victims suffered post traumatic stress disorder because of sexual abuse. The defense counsel did not object to the second expert's testimony.<sup>147</sup>

On appeal, the accused contended that it was plain error for the military judge to admit this testimony. The CAAF agreed. The court held that both experts exceeded their areas of exper-

tise by commenting on the credibility of the victims, an issue reserved for the fact finder.<sup>148</sup> The court said the doctors' opinions that sexual abuse had occurred were neither useful nor helpful to the jury because the jury was equally capable of making this determination. The court stated that the expert cannot act as a human lie detector. According to the court, such opinions violate MRE 608(a)'s limits on character evidence and exceed the scope of the witness's expertise. This testimony also usurped the role of the panel, which has the exclusive function to decide witness credibility issues.<sup>149</sup>

The testimony of these experts violated this rule because they both rendered an opinion as to the ultimate issue. The second expert also violated these rules because she testified that the boys were victims of incest. The court noted that she prefaced her testimony with the assertion that she was qualified to distinguish between founded and unfounded cases.<sup>150</sup>

### Advice

This case shows that counsel must walk a very thin tight rope when dealing with expert testimony. Qualified experts can inform the panel of the characteristics found in sexually abused children. A doctor who interviews the victim may also repeat the victim's statements identifying the abuser as a family member if there are sufficient guarantees of the statement's trustworthiness. An expert can also summarize the medical evidence and testify that the evidence in this case is consistent with the victim's allegations of abuse. The expert, however, cannot go beyond that and comment on the credibility of witnesses or testify that sexual abuse has occurred and identify the perpetrator of the abuse.<sup>151</sup>

### Eyewitness Identification

In recent years, an increasing number of cases have involved expert testimony on eyewitness identification. Typically, the expert is used to undermine the reliability of an eyewitness's identification by testifying about a number of factors that adversely affect the eyewitness's ability to accurately observe and relate the identification. In two cases this year, *United States v. Brown*<sup>152</sup> and *United States v. Rivers*,<sup>153</sup> the CAAF, for

144. *Id.* at 191.

145. 47 M.J. 404 (1998).

146. *Id.* at 407.

147. *Id.* at 407-08.

148. *Id.*

149. *Id.* at 409-10.

150. *Id.* at 408.

151. *Id.* at 410.

the first time, addressed the admissibility of expert opinion evidence relating to eyewitness identification. In both cases, the CAAF declined to announce a rule on the admissibility or inadmissibility of expert testimony on eyewitness identification. Rather, the court said the admissibility of this evidence would depend on the facts of each case.

In *Rivers*, the accused was convicted of distributing cocaine. On one occasion, the accused sold cocaine to a military police informant. On another occasion, he sold cocaine to the same informant and an undercover military police investigator. Prior to trial, the defense requested government funding for an expert in the field of eyewitness identification. The defense contended that the informant who identified the accused as the person who sold him the cocaine was lying. The defense also contended that the identification by the MPI investigator was unreliable because the investigator was inexperienced, nervous, excited, and of a different race than the accused.<sup>154</sup>

The convening authority and the military judge denied the defense request for an expert. The judge said that the defense-requested expert was properly qualified, that this was a proper subject matter of expert testimony, and the expert's conclusions are of the type reasonably relied on in the field. The judge, however, ruled that the probative value of the expert's testimony was substantially outweighed by the danger of confusing the issues, misleading the members, and wasting time. In making this ruling, the judge believed that this information would not help the panel members. According to the judge, under the facts of this case, the panel could consider any weaknesses in the identification without the aid of expert testimony.<sup>155</sup>

In *Brown*, the accused was charged with resisting apprehension, reckless driving, wrongful appropriation of a vehicle, and fleeing the scene of an accident. As a result of a domestic fight, the accused was placed in military confinement overnight. The next day he was escorted back to his quarters to get his medical records. While at the quarters, the accused fought with his wife, threatened his escort with a knife and then fled the scene. According to the escort, the accused was wearing tennis shoes, faded blue jeans, a denim shirt, and a dark blue baseball cap with the letter "A" on it.<sup>156</sup>

A few hours later, a utility worker stopped his truck at a gas station in Killeen, Texas. While getting gas, the utility worker noticed a man about forty feet away talking on a pay phone. According to the utility worker, the man was a thin black male, wearing blue jeans, a dark windbreaker, and a blue baseball cap with a white "A" on it. As the utility worker went to pay for gas, the man in the phone booth got in the truck and started to drive away. The utility worker ran after him and got a look at his face before he drove off in the truck. Later that day, the stolen truck was involved in an accident, and the accused was subsequently apprehended at his on-post quarters where he was hiding in a closet and holding a butcher knife.<sup>157</sup>

When the police searched the stolen truck, they found a blue baseball cap with the letter "A" on it and the name "Brown" embroidered on the side. The utility worker, whose truck was stolen, identified the accused in a photo line-up as the perpetrator.<sup>158</sup>

Before trial, the defense requested that the convening authority appoint a Dr. Cole as an expert witness for the defense in the area of eyewitness identification. The convening authority denied the request, and the defense renewed the request to the military judge at trial. The defense claimed that Dr. Cole would testify that the eyewitness's identification of the accused was unreliable because of several errors in his perception. The military judge denied the defense's witness request.

The judge ruled that Dr. Cole was a properly qualified expert and he had a proper basis to form an opinion. The judge, however, said that the probative value of this evidence was outweighed by the danger of unfair prejudice, and it was misleading to the members. The judge said that the matters Dr. Cole would testify about could be adequately covered in instructions and were not matters outside the members' understanding, where expert testimony would be helpful.<sup>159</sup>

The defense in *Rivers* and *Brown* appealed the military judges' decisions to exclude this testimony. In both cases, the CAAF examined how other courts have treated the admissibility of eyewitness identification experts. The court noted that until recently, most federal courts excluded this testimony. The CAAF, however, noted a trend in both state and federal courts to admit this testimony on a case-by-case basis. In *Rivers*, the

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152. 49 M.J. 448 (1998).

153. 49 M.J. 434 (1998).

154. *Id.* at 445.

155. *Id.*

156. *Brown*, 49 M.J. at 449.

157. *Id.* at 450.

158. *Id.* at 451.

159. *Id.* at 452.

court went no further. The court said any error the judge made in excluding this testimony was harmless because ultimately a military judge tried the accused. The court said that even if the expert may have been helpful to lay court members, the expert would not have been helpful to the military judge because he was already fully aware of any problems with the identification.<sup>160</sup>

In *Brown*, the CAAF did a more complete analysis. First, the court noted that the Army Court had ruled that the military judge erred in excluding some of the proffered expert testimony. According to the Army Court, some of the information regarding errors in perception, cross-racial identification, the impact of stress on memory, and the mental process of memory would have been helpful to the members.<sup>161</sup> The CAAF said this part of the Army Court's opinion was consistent with numerous appellate court holdings.<sup>162</sup> The CAAF then noted that several other courts have excluded this evidence because it is either not helpful to the fact-finder, or because of the risk of unfair prejudice. The court avoided adopting a bright line rule on the issue. Instead, the court held that as a general matter this evidence is not inadmissible.<sup>163</sup> The court did express doubt about the ability of the expert in this case to opine that the identification was unreliable. According to the court, there is nothing in the literature to suggest that an expert has the ability to render such a conclusory opinion.<sup>164</sup>

Finally, the CAAF adopted the Army Court's reasoning, which held that even if the judge erred in excluding this testimony, the error was harmless. Because the government's identification case was strong, particularly considering that a baseball cap with the accused's name on it was found in the stolen truck, the expert's testimony would not have had a substantial impact on the outcome of the case.<sup>165</sup>

These cases provide some valuable insight into the CAAF's view of eyewitness identification evidence. Most importantly, this evidence may be admissible depending on the facts of the case. If the expert is qualified, and the testimony is relevant, reliable, and not unduly prejudicial, the military judge should admit this evidence. Arguments that eyewitness expert testimony is inadmissible because it is unreliable and not helpful will not be successful. If there is a genuine need for the evidence and a qualified expert is able to testify, the military judge should admit this evidence.

Even if an expert is allowed to testify, according to the CAAF's dicta in *Brown*, the expert could not testify as to the ultimate issue—that the eyewitness's identification is unreliable.<sup>166</sup> The expert simply does not have the ability to render such an opinion, and it would not help the fact-finder. This is consistent with the CAAF's opinions in other areas, particularly experts in child abuse cases, who are precluded from opining about the ultimate issue. Therefore, practitioners who proffer this evidence must limit the expert's opinion to discussing what factors could affect the reliability of an eyewitness's identification. Likewise, opposing counsel must be wary of any attempt by an expert to opine that the identification is unreliable.

### Statements and Fabrications

Military Rule of Evidence 801(d)(1)(B) exempts out-of-court statements from the definition of hearsay if the statements are consistent with the witness's in-court testimony and are offered to rebut a charge of recent fabrication.<sup>167</sup> Both the Supreme Court and the CAAF have held that, for an out-of-court statement to be logically relevant rebuttal evidence, it must have been made before the improper influence or motive to fabricate arose.<sup>168</sup> In two cases this year, the CAAF struggled

160. *Rivers*, 49 M.J. at 447.

161. *United States v. Brown*, 45 M.J. 514, 517 (Army Ct. Crim. App. 1996).

162. *Brown*, 49 M.J. at 454.

163. *Id.* at 456.

164. *Id.*

165. *Id.*

166. *Id.*

167. MRE, *supra* note 2, MIL. R. EVID. 801(d)(1)(B). This rule states:

(d) A statement is not hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

*Id.*

with the question of how to determine when the improper motive arose.

In *United States v. Faison*,<sup>169</sup> the accused was convicted of indecent acts with his thirteen-year-old stepdaughter. On the evening of 18 February 1994, the accused had an argument with his stepdaughter. Later that night, the accused went into her room and, according to the stepdaughter, he fondled her. The next day, the victim reported this incident to her friend. At trial, the defense challenged the victim's credibility. On cross-examination of the victim, the defense elicited testimony that she had gotten rid of one of her mother's previous boyfriends by alleging that he abused her. The victim also admitted that she was angry at the accused on 18 February 1994 because he told her she could not call her boyfriend anymore. The victim also conceded that there were other times when she thought the accused punished her unfairly. During this cross-examination, the defense implied that the victim made the allegations against the accused, in part, because she was angry with him over the argument they had on 18 February 1994.<sup>170</sup>

On redirect, the trial counsel asked the victim about statements she made to her friends in August 1993 and January 1994. In these statements, the victim told her friends that the accused was "messing" with her. The government proffered this testimony under MRE 801(d)(1)(B) because they preceded her fight with the accused on 18 February 1994. The defense argued that this evidence was inadmissible hearsay because the victim was upset with the accused as early as August 1993 and, therefore, these statements were not made before a motive to fabricate existed. Although, the military judge denied the defense's objection, he did not receive the evidence under MRE 801(d)(1)(B). Instead, he said the statements were admissible, but could only be considered to rebut the defense's attack on the victim's credibility. He then gave a limiting instruction to the members, telling them that they could not consider this statement substantively.<sup>171</sup>

In *Allison*,<sup>172</sup> the accused was convicted of sodomizing his stepson. The victim reported the abuse to a teacher. Soon after this report, the victim provided a videotaped statement detailing the accused's sexual molestation of him. At trial, the defense

proffered several theories to show that the victim's testimony was unreliable. One theory was that initially the victim's mother did not believe the accusations, but manipulated the victim to establish grounds for divorce, obtain a monetary settlement, gain custody of the children, and remain in Germany. The defense also presented other theories to challenge the reliability of the victim's testimony.<sup>173</sup>

To rebut the claim that the victim's testimony was a product of his mother's manipulation, the government introduced the videotape that the victim made. At the time this videotape was made, the victim's mother did not yet believe the accused had abused her son. The government introduced this evidence under MRE 801(d)(1)(B). The defense objected, claiming that there had been a number of improper motives that affected the victim's testimony, and many of them had arisen before he made the videotape.

In both cases, the CAAF had to decide if the prior statements were made before a charge of improper motive or recent fabrication was made. In both cases, the court said the statements were made before a charge of improper motive and were admissible. In *Faison*, the defense implied that the argument on 18 February 1994, gave the victim a motive to fabricate her accusations against the accused the next day. According to the defense, her overall motive to fabricate arose earlier than her statements on August 1993 and January 1994.<sup>174</sup> In *Allison*, the defense contended that the victim had more than one motive to fabricate and several of these motives preceded the victim's videotaped statement.<sup>175</sup>

The CAAF said the defense's focus on when the motive to fabricate developed is misplaced. Military Rule of Evidence 801(d)(1)(B) is concerned with rebutting an express or implied charge by the party opponent that an impropriety occurred. The court said that, because it is often difficult, if not impossible, to determine the precise moment that an improper motive arose, the proper focus is on when the charged impropriety occurred, not when the underlying motive developed.<sup>176</sup> In *Faison*, the defense implicitly charged that the victim's argument with the accused on 18 February 1994 gave rise to at least one motive to

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168. See *Tome v. United States*, 513 U.S. 150 (1995). See also *United States v. McCaskey* 30 M.J. 188 (C.M.A. 1990).

169. 49 M.J. 59 (1998).

170. *Id.* at 61.

171. *Id.* at 62.

172. 49 M.J. 54 (1998).

173. *Allison*, 49 M.J. at 55-56.

174. *Faison*, 49 M.J. at 61.

175. *Allison*, 49 M.J. at 57.

176. *Faison*, 49 M.J. at 61.

fabricate and any statements prior to that date would rebut that charge.<sup>177</sup>

The court made a similar point in *Allison*, using much clearer language. In this case, the court held that, where multiple motives or improper influences are asserted, the statement need not precede all such motives or inferences, only the one it is offered to rebut.<sup>178</sup> In *Allison*, the CAAF said the military judge did not err in admitting this evidence of a prior consistent statement.

### Advice

In these cases, the CAAF seeks to clarify the proper focus for rebuttal evidence under MRE 801(d)(1)(B). So long as the prior consistent statement was made before at least one charge of improper motive or fabrication occurred, the statements are admissible to rebut that charge. By focusing not on when the motive may have developed, but on when the incident giving rise to the improper motive occurred, the court has opted for a pragmatic solution to an otherwise difficult proof problem. In doing so, however, the CAAF limited its earlier holding in *United States v. McCaskey*.<sup>179</sup> In *McCaskey*, the court focused on when “the story was fabricated or the improper influence or motive arose.”<sup>180</sup> That language is certainly broader than the court’s holding in either *Allison* or *Faison*.

These cases have important implications for both trial and defense counsel. Counsel must be very precise when attacking a witness’s credibility. They must look to the earliest possible incidents that gave rise to a witness’s motive to fabricate. They should expressly state that these early incidents are what gave rise to the witness’s motive to fabricate. Hopefully, these incidents occurred before the witness made any consistent statements. This alone, however, will not protect counsel from rebuttal evidence if they also allege other incidents that gave rise to improper influence or motive and these incidents occurred after the witness made a statement consistent with his in-court testimony. According to the court’s holding in *Allison*, so long as the witness’s consistent statement preceded any one of these charged incidents, it is admissible under MRE 801(d)(1)(B). Thus, the counsel attacking the witness may be forced to put all their eggs in one basket by looking for the earliest possible incident giving rise to a motive to fabricate, and

not addressing any motives that arose after the witness made a consistent statement.

On the other hand, the counsel proffering the witness should focus very closely on the various incidents that the opponent implies affected the credibility of the witness’s testimony. If, for example, the defense alleges that one incident affecting the witness’s in-court testimony was rehearsing his testimony with the trial counsel, any consistent statements that preceded these rehearsals are admissible as rebuttal evidence under MRE 801(d)(1)(B).

### Hearsay Review

In *United States v. Haner*,<sup>181</sup> the CAAF reviewed three of the most commonly used hearsay exceptions. The court provided insight into the court’s most recent view of these exceptions. In *Haner*, the accused was charged with assault and indecent assault on his wife. On the date of the offense, the accused stripped his wife, bound her, beat her with a belt, cut her with a knife, and inserted the handle of the knife into her vagina. The victim eventually escaped wearing nothing but a blanket and ran to a friend’s house, where she called the police. When the police arrived about twenty minutes later, the victim was very upset, still wearing nothing but a blanket, shaking, and crying hysterically. She told the police that her husband beat her and threatened her with a knife.<sup>182</sup>

The next day, the police officers and the district attorney referred the victim for medical treatment to document her injuries. Both a doctor and a social worker saw the victim. The victim told both of them what the accused had done to her. The doctor and social worker both testified that they saw the victim both to document the injuries and to provide any necessary medical treatment.<sup>183</sup>

Two days after the assault, the victim moved to Michigan to get away from the accused. A week later, the accused called her and made several threats against her. The victim immediately called the police who came to her home. She typed and signed a sworn statement to the police detailing everything the accused had done to her a week earlier. This statement provided the most detailed account of the assault.<sup>184</sup>

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177. *Id.* at 62.

178. *Allison*, 49 M.J. at 57.

179. 30 M.J. 188 (CMA 1990).

180. *Id.* at 192 (emphasis added).

181. 49 M.J. 72 (1998).

182. *Id.* at 74.

183. *Id.* at 76-77.

Once the victim learned that the Army preferred charges against her husband, she recanted her earlier statements. She claimed that the incident was consensual, sadoomasochistic, sexual activity. Faced with these recantations, the government offered the statements she made to the police and to medical personnel as hearsay exceptions. The military judge admitted all three of the statements. On appeal, the CAAF analyzed the admissibility of each statement.<sup>185</sup>

The defense first challenged the admission of the victim's statements to the police just after the incident. The military judge admitted these statements as excited utterances under MRE 803(2).<sup>186</sup> The CAAF noted that the victim made these statements about twenty minutes after she fled from her husband, and at the time she was still upset and crying. The court held that these statements were clearly admissible because the victim made them under the stress of excitement caused by the incident.<sup>187</sup>

Next, the defense challenged the admission of the statements the victim made to the medical doctor and to the social worker. The military judge admitted these statements under MRE 803(4), the medical treatment exception.<sup>188</sup> The defense argued that because law enforcement officials directed the victim to see the doctor and the social worker, the purpose of the visit was to preserve evidence; therefore, they did not fall within the medical treatment exception. The CAAF disagreed. According to the CAAF, it was not critical that law enforcement agencies directed the victim. The critical question was whether the victim had some expectation of treatment when she talked with medical personnel. The court agreed that there was sufficient evidence of the victim's expectation of medical treatment, and the statements were properly admitted. The court also noted that statements to social workers fall under the medical treatment exception.<sup>189</sup>

Finally, the defense challenged the admissibility of the statement the victim made to the police in Michigan a week after the

incident. The military judge admitted this statement as residual hearsay under MRE 803(24). The CAAF affirmed the judge's decision. The court said that the statement was material, necessary, and reliable. The court noted the following factors that showed the statement to be reliable: (1) the victim made the statement the day after the accused threatened her and one week after the incident, (2) she prepared the statement free of police questioning, (3) the victim was still in fear that the accused may come to Michigan and attack her, and (4) she took an oath and signed and initialed each page of the statement.<sup>190</sup>

### *Advice*

This case serves as an excellent review of three of the most commonly used hearsay exceptions. Most significant is the court's holding that statements made to law enforcement officials can be admitted under the residual hearsay exception if they have sufficient indicia of reliability. The court noted that the military judge made very specific findings that clearly demonstrated the reliability of these statements. Practitioners should review this case and these factors when litigating the admission of statements made to law enforcement officials under the residual hearsay exception.

### **Conclusion**

Evidence is an ever-changing and dynamic part of our criminal law practice. Indeed, the rules are the heart of our criminal practice and embody the values of our system of justice. Because these values change, courts and legislatures will continue to reevaluate and redefine these rules. Likewise, creative counsel will continue to push courts to interpret the rules in new ways and develop new law. These influences guarantee that this evidence saga will continue for many years to come. Get ready, because the 1999 installment is just around the corner.

184. *Id.* at 75.

185. *Id.*

186. MRE, *supra* note 2, MIL. R. EVID. 803(2). This rule defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

187. *Haner*, 49 M.J. at 76.

188. MCM, *supra* note 2, MIL. R. EVID. 803(4). This rule describes the medical treatment exception as "[s]tatements made for the purposes of medical diagnosis or treatment and described medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Id.*

189. *Haner*, 49 M.J. 76-77.

190. *Id.* at 77-78.

## Appendix

### a. Rule 513. Psychotherapist-patient privilege

(a) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made by or between the patient to a psychotherapist or an assistant to the psychotherapist, in a case arising under the UCMJ, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) Definitions. As used in this rule of evidence:

(1) A "patient" is a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) A "psychotherapist" is a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) An "assistant to a psychotherapist" is a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" is testimony of a psychotherapist, or assistant to the same, or patient records that pertains to communications by a patient to a psychotherapist, or assistant to the same for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) Who may claim the privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) Exceptions. There is no privilege under this rule under the following circumstances:

(1) Death of Patient. The patient is dead;

(2) Spouse abuse or child abuse or neglect. When the communication is evidence of spouse abuse, child abuse, or neglect or in a proceeding in which one spouse is charged with a crime against the person of the other spouse or a child of either spouse;

(3) Mandatory reports. When federal law, state law, or a service regulation imposes a duty to report information contained in a communication;

(4) Patient is dangerous to self or others. When a psychotherapist or assistant to a psychotherapist has a belief believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) Crime or fraud. If the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) Military necessity. When necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;



(7) Defense, mitigation, or extenuation. When an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or MRE 302, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) Constitutionally required. When admission or disclosure of a communication is constitutionally required.

(e) Procedure to determine admissibility of patient records or communications.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative of that the filing of the motion has been filed and that the patient has an of the opportunity to be heard as set forth in subparagraph (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient will be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings will not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

(3) The military judge shall examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise."

MRE 513. The analysis to MRE 513 is created as follows:

1999 Amendment: Military Rule of Evidence 513 establishes a psychotherapist-patient privilege for investigations or proceedings authorized under the Uniform Code of Military Justice. Military Rule of Evidence 513 clarifies military law in light of the Supreme Court decision in *Jaffee v. Redmond*. *Jaffee v. Redmond*, 518 U.S. 1 (1996). *Jaffee* interpreted Federal Rule of Evidence 501 to create a federal psychotherapist-patient privilege in civil proceedings and refers federal courts to state laws to determine the extent of privileges. In deciding to adopt this privilege for courts-martial, the committee balanced the policy of following federal law and rules when practicable and not inconsistent with the UCMJ, MCM and with the needs of commanders for knowledge of certain types of information affecting the military. The exceptions to the rule have been developed to address the specialized society of the military and separate concerns which that must be met to ensure military readiness and national security. See *Parker v. Levy*, 417 U.S. 733, 743 (1974); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988). There is no intent to apply the privilege MRE 513 in any proceeding other than those authorized under the UCMJ. Military Rule of Evidence 513 was based in part on proposed FRE (not adopted) 504 and state rules of evidence.

Military Rule of Evidence 513 is not a physician-patient privilege, instead it is a separate rule based on the social benefit of confidential counseling recognized by *Jaffee*, and similar to the clergy-penitent privilege. In keeping with American military law since its inception, there is still no physician-patient privilege for members of the Armed Forces. See the analyses for MRE 302 and MRE 501.

(a) General rule of privilege. The words "under the UCMJ" in this rule mean that ~~this privilege~~ MRE 513 applies only to UCMJ proceedings, and does not limit the availability of such information internally to the services, for appropriate purposes.

. . . .

(d) Exceptions. These exceptions are intended to emphasize that military commanders are to have access to all information and that psychotherapists are to readily provide information necessary for the safety and security of military personnel, operations, installations, and equipment.”